IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CUTBERTO VIRAMONTES, et al.,	)	
	)	
Plaintiffs,	)	Docket No. 21 C 4595
	)	
vs.	)	
	)	
THE COUNTY OF COOK, et al.,	)	Chicago, Illinois
	)	December 8, 2021
Defendants.	)	11:15 a.m.

TRANSCRIPT OF PROCEEDINGS - Status
BEFORE THE HONORABLE CHIEF JUDGE REBECCA R. PALLMEYER

APPEARANCES:

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(The following proceedings were had telephonically:)

THE CLERK: 21 C 4595, Viramontes, et al. versus the County of Cook, et al.

THE COURT: Okay. Good morning.

Let me get your appearances for the record. We will begin with the plaintiff. Counsel for plaintiff, if you would introduce yourselves.

MR. PATTERSON: Yes. This is Pete Patterson from Cooper & Kirk. My colleague Will Bergstrom is on as well.

THE COURT: And for defendant.

MS. SCHELLER: Good morning, your Honor.

Assistant State's Attorneys Jessica Scheller, Prathima Yeddanapudi, and Hellin Jang for the defendants.

THE COURT: Okay. Good morning.

I have read the submissions, and I understand it's the plaintiffs' position that this case really is one where the Court should immediately enter judgment against the plaintiff and take -- allow them to take the case upstairs to the Court of Appeals with the expectation that there are no facts or discovery that would militate against a finding in favor of the defendants as the law stands today.

Is that your understanding? It's the expectation of the plaintiffs that they would like to get the matter before the Court of Appeals because they believe that the Court of Appeals may want to change its mind, and they

recognize that I am not in a position to do that for them?

MR. PATTERSON: Yes, your Honor. This is Pete Patterson for the plaintiffs. That's exactly right.

And if I could make one more point in addition to what we have put in our brief, your Honor may be familiar with the *New York State Rifle & Pistol Association* case currently before the United States Supreme Court. A similar thing happened in that case as to what we believe should happen in this case where the plaintiffs filed the lawsuit. It was controlled by Second Circuit precedent. There was an immediate motion to dismiss in that case, and the plaintiffs acknowledged it should be entered.

Same thing happened in the Second Circuit. And then they filed a cert petition, and the Supreme Court granted it. And there have been dozens of amicus briefs on both sides. The Supreme Court essentially has all the information it needs to decide the case, although the State in that case has said to the Supreme Court: If you are going to rule against us on the legal principles, you should remand to build more of a record. And the plaintiffs in that case disagree.

But if we do get up and the Seventh Circuit decides to change its mind on the legal principles or the U.S. Supreme Court were to decide to take this case, you know, at that point there might be a dispute amongst the parties as to

whether this needs to go back down for more fact development. We likely would say it wouldn't. The State may say it does.

But at this point, unless and until that precedent changes, it really -- there really is no reason to do anything in the district court.

And in *Wilson*, the plaintiffs were saying there needed to be more fact discovery, and the Seventh Circuit rejected that. There is no need to do anything different since it's the defendant that's saying there needs to be more discovery.

So thank you for your indulgence, your Honor. I just wanted to make those few points.

THE COURT: Okay. Can I hear from Cook County or the defendants on your views on this whole issue about whether or not the Court should simply enter judgment in your favor.

MS. SCHELLER: Yes, your Honor. Thank you. Jessica Scheller appearing on behalf of the defendant.

We've discussed this with plaintiffs' counsel. And I think it can reduced to a very fine point arising out of the precedent upon which we have relied in *Wilson* and which we believe supports our regulation when you go back to the *Friedman v. Highland Park* case, and that is, in *Friedman v. Highland Park*, the Seventh Circuit noted that the defendants had not developed a record as to whether or not this

particular class of weapon as regulated was dangerous and unusual.

We do intend to develop such a record. We do think that that would be an additional basis pursuant to which we could potentially win on the merits. And we think we should be entitled to engage in discovery and develop a record as to those facts given that plaintiff has slated them and we have denied them.

So I think that there is room within the current legal framework for discovery on the issue of whether or not assault weapons and large capacity magazines are dangerous and unusual; therefore, not qualifying for Second Amendment protection. That is the basis pursuant to which we would like to conduct discovery. And we do think that the law supports us on this point.

THE COURT: Let me presume that the law does support you on this point, that these are dangerous weapons and that provides us a second basis for judgment in your favor. Is there a reason that this court should develop that record now given that you, under the current state of the law, are entitled to judgment even without such a showing?

MS. SCHELLER: Yes, your Honor. We believe that it is better to litigate cases wholly and fully in the district court and not to engage in piecemeal litigation and appellate review, which is a strategy that is disfavored by the Seventh

Circuit and presumptively also by the Supreme Court as well.

There are several issues which we do not believe we need to conduct discovery on. We do believe the law supports them, and we are glad plaintiffs concede them.

But whether or not the law recognizes and we can develop a factual record that these weapons and large capacity magazines are dangerous and unusual is in the area that the Seventh Circuit has not spoken on. And we think as the defendants in this case, we should be permitted to develop every defense available to us under the law so long as we are acting in good faith, and we are doing that here.

We think it's somewhat unfair for plaintiffs to come to the Court and say, well, they can win on this basis, so they have to win on that basis. We would like to win on that basis as well as on the secondary basis, and we think that it's better to litigate everything at once rather than to engage in some haphazard strategy with plaintiffs' motion for judgment on the pleadings that they concede they are seeking Supreme Court review on only to argue later that we should come back and relitigate part of this case.

It's a logical -- it's not consistent with the way that cases are typically managed, and we would argue that it's inappropriate in this circumstance.

THE COURT: Let me ask one more question given the situation with the New York challenge that has made its way

to the Supreme Court without any further fact-finding.

Do you know whether the City of New York objected in that case to proceeding without further fact-finding?

MS. SCHELLER: Your Honor, I'm not involved in that litigation and cannot speak to it. I would defer to my opponent.

MR. PATTERSON: Yes. This is Pete Patterson for the plaintiffs.

We actually represented the plaintiffs in the district court in that case. New York did not object. They actually filed a motion to dismiss.

And in terms of, you know, before the Supreme Court, we don't think there would need to be a remand, because if you look before the Supreme Court now, at issue in the New York case there are social science issues, historical issues. There are dozens of amicus briefs on both sides of the case addressing all sorts of issues. All the evidence that the court would need is before it.

And as Judge Posner said in the *Moore* case, these are legislative facts. If they want to build a record that these things are dangerous and unusual, they can do that in briefing and through citing social science evidence and those sorts of things. I'm sure they will have many amicus briefs on their side if this case were to get to the U.S. Supreme Court. So there really is no need to build more of a record.

And in terms of not accepting a ground for victory, the current Chief Justice when he was on the D.C. Circuit in a case said, if there's no -- something to the effect that, if there's no need to decide more, there's a need not to decide more.

So they are entitled to victory. They are trying not to accept it, I guess. But it just is a waste of judicial resources. And potentially when you are dealing with a fundamental right that we are alleging -- we are suffering irreparable harm every day this is in place -- it's just our view that it's inefficient and prejudicial to keep the case in district court longer than it needs to be. No offense to your Honor. But precedent controlled the outcome.

THE COURT: Well, the argument that -- go ahead.

MS. SCHELLER: I was going to say, if I may briefly respond?

I think it's somewhat questionable that my opponent should suggest the type and quality of evidence we would rely upon to assert our defense.

So we are not satisfied in this particular case with relying upon the efforts of potential amici related to whether or not these weapons are dangerous and unusual and, therefore, fall outside of the scope of Second Amendment protection.

But beyond that, this particular point is an

important one because in *Friedman*, the Supreme -- excuse me -- the Seventh Circuit assumed that these weapons received Second Amendment protection and, therefore, launched into its analysis. So they said, assuming the Second Amendment applies.

So while we do believe there is a basis for victory under *Friedman* and, in fact, *Wilson*, we would like to challenge the underlying premise that the Second Amendment applies to these cases.

The plaintiffs filed this challenge. They are the ones who brought this fight to court. It is somewhat unusual, I think, that they are then refusing to allow us to fight it and resolve it on the merits.

THE COURT: Well, it's unusual on both sides, obviously. It's unusual for a defendant who has been invited to take judgment in its favor to decline. It's also unusual for a plaintiff to file a lawsuit and make clear in its initial filing that the lawsuit is doomed.

I guess what I'm wondering is whether -- let me just point out. I can see pragmatic reasons for not wanting to proceed immediately with the Court of Appeals and for creating a substantial record at this level. I can see pragmatic arguments for that because it is entirely possible, as defendants point out, that the court could make a finding based on well-developed facts that would provide an

alternative reason for judgment in favor of the defendant.

If we don't do that and the Court of Appeals takes whatever action it may take, there is always the message that gets sent by the decision that somehow everything has been decided when perhaps it has not.

What I wonder -- at the same time -- I at the same time recognize what Justice Roberts has said, as plaintiffs point out, and what is generally the practice of -- good judiciary practice, which is, if there is a difficult issue that you don't need to reach, don't reach it. If there is a difficult reason and a simple reason for a case to be decided, choose the simple one, and that would be ordinarily what I would like to do here.

What I wonder, given the concerns that the defendants -- the legitimate concern the defendants have about this, is whether or not an order or judgment order that we draft could make very clear that the defendants acknowledge -- I'm sorry -- that the plaintiffs acknowledge the need for additional fact-finding should the Court of Appeals make a particular decision.

I would assume that you would be willing to do that except for the fact that moments ago you told me that you believe -- plaintiffs' counsel told me, that is, that you believe that there is no real need for fact-finding because all of the amicus briefs cover these issues -- these factual

issues substantially, and the facts are all legislative facts anyway. I don't know whether the defendants would agree with that.

But my question, I guess, is: Would the plaintiffs be willing to draft language that makes it clear that they recognize the need for fact-finding on the issue of dangerousness should the Court of Appeals believe that we are going to reach that issue?

MR. PATTERSON: Your Honor, this is Pete Patterson.

And, no, we would not agree with that. What I was saying is that the defendants would be free to argue that, and we could have a dispute about that.

But our view is that these are legislative facts and not just amici, but the parties can brief those facts. And it's shown very clearly in the *Moore v. Madigan* decision that we cited that dealt with, has Illinois proven that its ban on carrying firearms is substantially justified in terms of public safety? And that was on an appeal of a grant of a motion to dismiss.

The parties were able to bring all the information from the empirical literature before the Court in the briefing. Judge Posner evaluated all that, and he said, typically when reviewing a motion to dismiss, we would remand for further factual development.

But there are no adjudicative facts in this case.

These are all legislative facts. There is no need to send it back. And he decided the case on the merits on an appeal from a grant of a motion to dismiss. And we submit that the same procedure would be the proper one here as in the *Bruen* case in the U.S. Supreme Court where the State of New York is arguing that if the court is going to reverse, it should remand.

But, you know, I'm not going to prophecy which way the United States Supreme Court is going to go, but there is substantial evidence through the briefing of the parties, through the briefing of the amici, and there is good reason to think that the court is not going to remand it, but instead will just decide the case because, again, these are legislative facts. Whatever facts would be developed in the trial court are not going to be binding in the Court of Appeals as with legislative facts because they are legal issues, and they would be reviewed *de novo*. The record would not be closed.

So no, we would not agree that there needs to be further factual development.

THE COURT: What is the current status of the New York case in the Supreme Court? Is it fully briefed?

MR. PATTERSON: It's briefed, and it was argued November 3rd, I believe. We are no longer representing the plaintiffs in that case, but we have been following it. And

I anticipate probably a decision in June, I would guess.

THE COURT: Tell me what discovery you would want to proceed with from the standpoint of the defendants if I deny the plaintiffs' motion to take judgment against them.

MS. SCHELLER: Sure. Your Honor, we plan to develop a record concerning the dangerous and unusual nature of these weapons on multiple fronts.

First, we plan to disclose medical experts that will discuss the types of injuries that can be caused by this particular firearm as compared to handguns, which is a deficiency noted by the Seventh Circuit in the discovery and development of the record in the *Friedman* case.

We also intend to develop a record from law enforcement concerning how difficult it is to engage in a situation when an assault weapon is being used by someone illegally at that moment.

So we plan to discuss how dangerous and unusual these weapons are both in terms of the type of injuries that can be caused, how many people can be injured in a specific period of time, as well as the dangers and risks posed to law enforcement by engaging with someone who is using one of these weapons, including whether they can effectively resolve a threat caused by a mass shooter, for example.

Those are the main topics and areas which we would like to explore and develop. And I would like to point out

that those are not legislative facts. These are facts that go to the heart of the type of weapon and whether or not they are dangerous and unusual, which is an area that has not been well developed or defined by law in this circuit or in others.

THE COURT: What would be your expectation about the timetable for completion of this discovery?

MS. SCHELLER: Your Honor, we did submit a proposed 26(f) report. Let me pull that up. And I may tap one of my colleagues, Ms. Yeddanapudi, to speak on that point.

(Brief pause.)

THE COURT: In the meantime, I could look at the docket submission.

MS. SCHELLER: I'm sorry, your Honor.

THE COURT: No problem.

(Brief pause.)

MS. SCHELLER: Your Honor, assuming that everyone can line up their experts in the event that the Court permits discovery, we are proposing that discovery be completed by May of 2022. I think it's May 15th.

THE COURT: I do recognize that the *Friedman* decision -- the case law in the Seventh Circuit appears to recognize -- appears to see a gap in the records that were created in those cases and a suggestion that there was an alternative basis for judgment.

I can see really powerful arguments in both directions in this case, but I think the wiser course is to develop a record, at least to some degree, given that we are likely to have to wait until June.

If there were a decision rendered in the New York case in the meantime earlier than June that suggests a direction that we ought to be going in here, we can obviously revisit the issue.

But I believe it's appropriate to allow some discovery on the issues of the dangerousness of the particular weapons at issue in this case, recognizing that some of them may very well be legislative facts. But that aside, that does not necessarily mean that the district court doesn't want to consider them. And some of the facts may go beyond that categorization in any event -- some of the discovery that we would want to do.

So I will direct that you proceed with discovery. And I would like to set a telephone status to make sure you are on track, say, in February.

MR. PATTERSON: Okay. Thank you, your Honor. Do you want to set that now?

THE COURT: Yes. I am going to ask my deputy to give us a date in mid to late February for a telephone status.

(Brief pause.)

THE CLERK: I'm sorry. I was on mute.

How about February 25th at 9:00 o'clock?

MR. PATTERSON: That should work for plaintiffs.

MS. SCHELLER: Thank you, your Honor. That date also works for the defendants.

THE COURT: I will talk to you then.

Thank you. Thanks for your submissions. I know that I am in good hands with the lawyers here. You have done a good job. Thank you.

MR. PATTERSON: Thank you, your Honor. Appreciate your time today.

THE COURT: Sure.

MS. SCHELLER: Thank you.

(An adjournment was taken at 11:36 a.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Frances Ward January 5, 2022.
Official Court Reporter
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